NO. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF SENATORS SHELDON WHITEHOUSE AND RICHARD BLUMENTHAL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. Principles of Justiciability and *Stare Decisis* Are Fundamental Rules of Adjudication that Safeguard the Limited Role of Article III Courts. 7

A. Principles of Justiciability Safeguard the Apolitical Role of the Courts and Counsel Against Unnecessarily Reaching the Merits in this Case. 7

B. *Stare Decisis* Is a Key Attribute of Article III Courts and Would Require Reaffirmance of *Abood* Even if the Court Reached the Merits 11

II. Strict Adherence to These Neutral Principles of Adjudication Is Especially Important in This Case 16

A. This Case Is the Product of a Sustained Partisan Effort 16

B. The Court Should Be Vigilant in Preserving Its Apolitical Integrity. 21

CONCLUSION 26

APPENDIX A-1

TABLE OF AUTHORITIES

PAGE(S)

Cases

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) ..... *passim*

Arizona Christian Sch. Tuition Org. v. Winn,
563 U.S. 125 (2011) 8

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285 U.S. 393 (1932) 4, 14

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475 U.S. 292 (1986) 13

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568 U.S. 398 (2013) 8

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551 U.S. 177 (2007) 13

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530 U.S. 428 (2000) 14, 15

Ellis v. Brotherhood of Ry. Clerks,
466 U.S. 435 (1984) 13

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502 U.S. 197 (1991) 14

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570 U.S. 693 (2013) 8, 9

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138 S. Ct. 377 (2017).....9

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are United States Senators Sheldon Whitehouse of Rhode Island and Richard Blumenthal of Connecticut. As legislators and members of the Senate Committee on the Judiciary, *amici* have a front-row view of both the virtues of America's constitutional democracy and the hazards to it from political interference. In this post-*Citizens United* environment, in which political campaigns funded by unlimited "dark money" from undisclosed sources have proliferated, *amici* hear routinely from constituents who believe our democratic institutions are broken and that our courts have become too politicized.

Amici file this brief to emphasize the implications of this unusually politicized case for the Court's standing in the eyes of the American public. Because "'[j]ustice must satisfy the appearance of justice,'" *Liteky v. United States*, 510 U.S. 540, 565 (1994) (Kennedy, J.) (quoting Justice Frankfurter in *Offutt v. United States*, 348 U.S. 11, 13 (1954)), *amici* write to underscore the value of scrupulous

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

adherence to neutral principles of adjudication (including principles of justiciability and *stare decisis*). Failure to adhere to those bedrock principles risks undermining not only the Constitution's bounds on the proper role of federal courts, but also public confidence in the Court's apolitical role as a neutral arbiter of the law.

As that confidence in our democratic institutions has eroded in recent years,[2] even this Court has not been immune from growing skepticism about its ability to carry out its constitutional responsibilities in an apolitical manner. Particularly damaging is a loss of confidence that individuals will get a fair shake against powerful business interests. This brief urges the Court to exercise special vigilance in resisting petitioner's invitation to embark on an enterprise that may further undermine its institutional standing and authority.

SUMMARY OF ARGUMENT

Key to our constitutional system of government is proper balance among the federal government's three branches. The Constitution's system of checks and balances provides important safeguards, but also suggests a duty of self-restraint by legislators, judges, and executive officials as they carry out their respective constitutional tasks.

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[2] *See* pp. 23-25, and notes 14-16, *infra*.

This is particularly true for the Judiciary, which, beyond the President's role in nominating judges and the Senate's role in advising on and consenting to such nominations, is relatively unconstrained. Once appointed, federal judges enjoy life tenure, and their orders are not subject to the President's veto.

Given this power, Article III courts must be—and traditionally have been—ever vigilant to the constitutional limitations on their authority. Principles of justiciability are therefore a critical guardrail that keeps the Judiciary in its constitutionally prescribed lane. "[A] judge . . . is not [a] knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (Yale Univ. Press 1921). Article III's "Case or Controversy" and standing requirements constrain such roaming by serving as "an apolitical limitation on judicial power." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230–31 (1993).

Applying those principles here, the Court should dismiss this case as improvidently granted—and need not even reach the merits of petitioner's request to uproot a 40-year-old precedent. This Court's jurisdiction over the case is, at best, dubious: Petitioner sought to intervene in a lawsuit filed by a different plaintiff (a state governor) who indisputably lacked Article III standing because he failed to allege any violation of his own First Amendment rights and therefore had "no personal interest at stake" in the lawsuit. JA108. As a result,

as the court of appeals recognized, "there was nothing"—in other words, no "Case or Controversy" under Article III—"for [petitioner] . . . to intervene in." Pet. App. 3a. This Court has a longstanding rule that intervention in an action over which the court lacks jurisdiction cannot "cure th[e] vice in the original suit," *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 163–64 (1914). That longstanding rule dictates the proper result here: The Court should dismiss the writ of certiorari.

If the Court nevertheless reaches the merits, *stare decisis* requires it to reaffirm *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), once again. Like the well-established justiciability principles described above, *stare decisis* is one of the defining attributes that distinguishes the Judiciary from the political branches. A legislative majority or executive official can freely change policy, and then answer for it to the public; courts, on the other hand, adhere to governing precedents. Indeed, *stare decisis* "rests on the idea, as Justice Brandeis famously wrote, that it is usually 'more important that the applicable rule of law be settled than that it be settled right.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). This not only reflects that precedents create significant reliance interests, but also that *stare decisis* is fundamental to the separation of powers. Adherence to precedent restrains uninhibited judicial policy-making.

As respondents have explained—and *amici* need not repeat here—*Abood* was correctly decided. More important for present purposes, however, *Abood* is deeply entrenched in the fabric of the law, has been reaffirmed numerous times by this Court (including within the last few years), and has engendered substantial reliance interests over the four decades since it was decided. An urgent need would be required to change it; none emerged in those prior reaffirmances; and no urgent need exists now.

If *stare decisis* means anything, it must mean that a precedent should not be overturned simply because a differently composed court emerges. "A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (citation omitted). Decision-making begins to look like prize-taking when precedents are reversed as Court majorities shift.

Judicial restraint is all the more important in today's climate and this case in particular. Sophisticated and powerful interests routinely appear in droves to enlist federal courts as their agents in political contests. This case presents itself to the public eye as merely the latest chapter in a sustained—and, to date, unsuccessful—political

effort to overturn a longstanding precedent in order to achieve anti-union political goals.

Worse, the well-heeled interests seeking to overturn *Abood* have all but declared that victory is pre-ordained—in effect, because of nothing more than a "change in [this Court's] membership," *Casey*, 505 U.S. at 864, since the same issue last came before it.[3] These bold predictions, which can only taint the Court's institutional standing, surely must disconcert any member of the public who cares about the Judiciary's impartiality. The highly unusual procedural history of this case—including petitioner's failure to develop any meaningful factual record below and the eleventh-hour attempt to substitute new plaintiffs after it became apparent that a state governor had no standing to challenge a law with no direct application to him—should only underscore the need for caution in how this Court approaches the case.

Against this backdrop, scrupulous adherence to rules of justiciability and *stare decisis* becomes vital—both to preserve public confidence in the Court's fair and impartial disposition of this case and to send a strong message to special-interest

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[3] *See, e.g.*, Freedom Foundation, Fundraising Letter, October 2017 (copied in the attached Appendix) at A-2, A-8 (explaining that "we expect to win this one" after the appointment of Justice Gorsuch as the "decisive vote," and predicting "a day of reckoning is on the way."); *infra* note 9.

groups that the Court will not be used as a mere instrument to further a partisan policy agenda.

ARGUMENT

I. Principles of Justiciability and *Stare Decisis* Are Fundamental Rules of Adjudication that Safeguard the Limited Role of Article III Courts.

A. Principles of Justiciability Safeguard the Apolitical Role of the Courts and Counsel Against Unnecessarily Reaching the Merits in this Case.

1. Principles of standing and justiciability are fundamental to the limited authority of federal courts under Article III of the Constitution.

> Standing is an apolitical limitation on judicial power. It restricts the right of conservative public interest groups to challenge liberal agency action or inaction, just as it restricts the right of liberal public interest groups to challenge conservative agency action or inaction. . . . It does derive from and promote a conception that judicial power is properly limited in a democratic society. That leaves greater responsibility to the political branches of government–however they are inclined.

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230–31 (1993); *see also Hollingsworth v. Perry*, 570 U.S. 693 (2013) (standing "ensures that we act as *judges*, and do not engage in policymaking properly left to elected representatives"); Alexander M. Bickel, *The Least Dangerous Branch* 125–26 (Bobbs-Merrill Co. 1962) (doctrines such as standing should be applied to avoid unnecessarily resolving controversial political issues).

As this Court has recognized, "[c]ontinued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) ("[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.") (citation omitted). Conversely, "[f]ew exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them." *Winn*, 563 U.S. at 145–46. Accordingly, "courts must be more careful to insist on the formal rules of standing, not less so." *Id.* at 146.

These principles preserve the authority of courts to deliver binding judgments that the public will

respect. Importantly, they also protect the Framers' vision that "the judiciary . . . will always be the least dangerous to the political rights of the Constitution. . . . It may truly be said to have neither FORCE nor WILL, but merely judgment." *The Federalist No. 78*, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[4] The more its "judgment" appears susceptible to political winds and pressures, the greater the damage to the Judiciary.

2. These justiciability principles call for judicial restraint in this case. Even a cursory review of the bizarre procedural history of this litigation highlights that this Court's jurisdiction—like that of the courts below—is, at best, dubious. Petitioner (along with two other non-union state employees) sought to intervene in an action brought by Illinois Governor Bruce Rauner to overturn *Abood* and challenge the constitutionality of fair-share union fees. There was one problem, however: The district court (correctly) ruled that Governor Rauner lacked standing to sue and had failed to sufficiently raise a federal question. *See* JA107-108. Nevertheless, the

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[4] Similarly, this Court regularly applies related principles of judicial restraint to either altogether avoid becoming entangled in the resolution of political questions reserved to a different branch of government, *see, e.g.*, *Nixon v. United States*, 506 U.S. 224 (1993) (political question doctrine), or to refrain from unnecessarily resolving contentious issues before it is necessary to do so, *see, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 377, 377 (Mem.) (2017) (mootness); *Hollingsworth*, 570 U.S. 693 (standing to appeal).

court allowed petitioner Mark Janus to intervene in the action, even while acknowledging the general rule that "a party cannot intervene if there is no jurisdiction over the original action." JA110. Likewise, the Seventh Circuit recognized that, "[t]echnically, of course, there was nothing for [petitioner] . . . to intervene in, given the dismissal of the governor's complaint." Pet. App. 3a. But it, too, overlooked that obstacle, reasoning that it would simply be more efficient to allow petitioner to intervene (and file an intervenor complaint).

As this Court has explained, where a court lacks jurisdiction over an action, intervention cannot "cure th[at] vice in the original suit." *McCord*, 233 U.S. at 163–64; *see also* 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1917, at 581–82 (3d ed. 2007) (intervention "presupposes the pendency of" a properly filed lawsuit and "cannot create jurisdiction if none existed before"). To be sure, some lower courts have carved out an exception to this rule, but this Court has never recognized or approved such an exception. Now would be a poor time to do so—and the jurisdictional "vice in the original suit" therefore remains. Longstanding principles of judicial restraint accordingly counsel the Court to dismiss the writ of certiorari as improvidently granted. *See, e.g., Jefferson v. City of Tarrant*, 522 U.S. 75, 80 (1997). Indeed, dismissal is especially appropriate, given the procedurally anomalous and overtly political nature of this case. *See* Point II, *infra*.

B. *Stare Decisis* Is a Key Attribute of Article III Courts and Would Require Reaffirmance of *Abood* Even if the Court Reached the Merits.

1. Just as principles of justiciability limit the range of matters in which courts will become involved, *stare decisis* constrains the judicial role in deciding cases properly before a court. *Stare decisis* is a "foundation stone of the rule of law." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (citation omitted). It "promotes the evenhanded, predictable, and consistent development of legal principles [and] fosters reliance on judicial decisions." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Casey*, 505 at 854 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (citing Lewis Powell, *Stare Decisis and Judicial Restraint*, J. Sup. Ct. Hist. 13, 16 (1991)).

In addition to protecting the public's reasonable reliance on settled law to govern their future behavior, *stare decisis* "contributes to the actual and perceived integrity of the judicial process," *Payne*, 501 U.S. at 827, by ensuring that the decisions of Article III courts are "founded in the law rather than in the proclivities of individuals," *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)—in other words, that they are not merely the product of roaming "knight-errant[ry]." Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (Yale Univ. Press 1921).

In this respect, *stare decisis* is another fundamental aspect of the rule of law that distinguishes courts from the political branches. While it is expected that a changing of the guard in the Executive Branch or in Congress may presage new policies,[5] greater constancy and predictability are expected of the Judicial Branch. Institutional harm to the courts is especially acute when overruling a precedent appears to be based on nothing more than change in the composition of a court. "A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more

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[5] *See, e.g.*, *U.S. Airways v. McCutchen*, No. 11-1285, Oral Arg. Tr. at 32:20–24 (Nov. 27, 2012), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/11-1285.pdf (Roberts, C.J., to counsel for the Secretary for Labor: "It's perfectly fine if you want to change your position, but don't tell us it's because the Secretary has reviewed the matter further, the Secretary is now of the view. Tell us it's because there is a new Secretary."). Even in cases involving executive officials whose ability to reverse course is constrained by the Administrative Procedure Act, the officials "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one," but only "that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Courts, by contrast, may not overrule a precedent simply because they believe that, all things considered, a new tack is better than the one previously taken.

lasting injury to this Court." *Casey*, 505 U.S. at 864 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)).

2. If the Court reaches the merits of this case, *stare decisis* points inexorably to one result: As the settled law of this Court, and absent an extraordinarily strong reason for overruling that precedent, *Abood* should be reaffirmed.

Correctly applying settled First Amendment principles, this Court has repeatedly reaffirmed *Abood* over the last four decades, maintaining its core distinction between collective bargaining activities (whose costs the government can demand employees share) and political activities (whose costs it cannot). *See Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984); *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007); *Locke v. Karass*, 555 U.S. 207 (2009); *see also Harris v. Quinn*, 134 S. Ct. 2618 (2014) (while questioning *Abood*, declining to overrule it); *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (Mem.) (per curiam) (affirming judgment by an equally divided Court), *pet. for reh'g denied*, 136 S. Ct. 2545 (2016).

Abood is "not just any precedent: it is entrenched in a way not many decisions are," and has "created enormous reliance interests." *Harris*, 134 S. Ct. at 2645, 2651–52 (Kagan, J., dissenting). More than 20

States have enacted statutes authorizing fair-share provisions, and on that basis public entities of all stripes have entered into multiyear contracts with unions containing such clauses. "*Stare decisis* has added force," this Court has held, when overturning a precedent would require "States to reexamine [and amend] their statutes." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202–03 (1991). That is precisely the case here.

Petitioner suggests that *stare decisis* is easily trumped if Members of this Court question *Abood*'s application of First Amendment principles. *See* Pet'r Br. at 8. But respect for precedent only when a majority of the Court agrees with the precedent isn't *stare decisis* at all. As this Court has recognized, "[r]especting *stare decisis*" even "means sticking to some wrong decisions," *Kimble*, 135 S. Ct. at 2409—though petitioner presents no good reason to believe *Abood* was wrongly decided in any event. "The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually 'more important that the applicable rule of law be settled than that it be settled right.'" *Id.* (quoting *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting)).

A prime example is Chief Justice Rehnquist's opinion for a 7-2 Court in *Dickerson v. United States*, 530 U.S. 428 (2000), which upheld the Court's decision 34 years earlier in *Miranda v. Arizona*, 384 U.S. 486 (1966). Although Chief Justice Rehnquist had been one of *Miranda*'s most prominent critics, he authored the Court's majority opinion adhering to that precedent, emphasizing that it had "become

embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson*, 530 U.S. at 443. "Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now." *Id.*[6]

A fortiori, the four-decades-old and repeatedly reaffirmed *Abood* decision remains binding precedent today. Petitioner has identified no meaningful change since the string of decisions reaffirming *Abood*, *see supra* at 13-14, and thus—at least implicitly—seeks the overruling of precedent based on an intervening change in this Court's membership. As explained above, the long-term institutional harm that would result from accepting that logic is reason enough to reject it.

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[6] *See also* Jeffrey Rosen, *Rehnquist the Great?*, The Atlantic (Apr. 2005), *available at* https://www.theatlantic.com/magazine/archive/2005/04/rehnquist-the-great/303820/ (noting that Chief Justice Rehnquist's "evolution from *Miranda*'s leading critic to its improbable savior infuriated conservatives and confused liberals; but in fact it was emblematic of his career").

II. Strict Adherence to These Neutral Principles of Adjudication Is Especially Important in This Case.

A. This Case Is the Product of a Sustained Partisan Effort.

In the ordinary case, a litigant who has suffered a real-world harm—something more than mere disagreement with a constitutional ruling—files suit to protect a concrete legal interest; the parties develop a factual record and fully air their arguments in the courts below; and their dispute may ultimately reach this Court. In short, litigation is conducted, as expected, in naturally-arising cases or controversies. Not here. This case is not only bizarre in its procedural history, it is part of a broader special-interest campaign spanning multiple cases that departs from the ordinary course of litigation in multiple ways.

The cross-case commonalities of this campaign are many, but one is common funding. As the press has reported, the *Friedrichs* case heard last Term was underwritten by the Lynde and Harry Bradley Foundation, which has openly acknowledged its goal of "reduc[ing] the size and power of public sector unions."[7] The Bradley Foundation not only

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[7] Lynde and Harry Bradley Foundation, *Giving Areas*, http://www.bradleyfdn.org/What-We-Do/Giving-Areas. *See* Brian Mahoney, *Conservative group nears big payoff in Supreme Court case*, Politico (Jan. 10, 2016),

bankrolled the nonprofit law firm bringing that case, but also donated to eleven different organizations that filed *amici curiae* briefs supporting the plaintiffs. *See* Mahoney, *supra* note 7. Many reappear here,[8] and in out-of-court statements, several of these *amici* have trumpeted their confidence in a pre-ordained outcome.[9]

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https://www.politico.com/story/2016/01/friedrichs-california-teachers-union-supreme-court-217525; Adele M. Stan, *Who's Behind Friedrichs?*, American Prospect (Oct. 29, 2015), http://prospect.org/article/whos-behind-friedrichs.

[8] Indeed, *amici* believe this case illustrates well why it may be time for this Court to strengthen the disclosure requirements for the "friends of the court" who appear before it. *Amici* are particularly concerned that the Court is not well served by the spectacle of the champing claque of "friends" who so constantly importune it for decisions beneficial to their political or financial interests, nor by the lack of transparency about who is behind these groups. *See* Sup. Ct. Rule 37.6 (limiting requirement to disclose funding for "*the preparation or submission of the brief*") (emphasis added). The lessons of Penelope about presumptuous suitors, or of the Bible about those who bring so much business into the temple, may be instructive. *See* Homer, The Odyssey, Book XVI, *The Iliad & The Odyssey* 628 (Samuel Butler trans.); *The Bible*, Matthew 21:12–17, Mark 11:15–19, and Luke 19:45–48 (King James).

[9] *See, e.g.*, Freedom Foundation Fundraising Letter, Appendix, at A-1, A-7 ("A Judgment Day is coming very soon. . . . [W]e may well be on the verge of an historic victory over government unions . . . . We are very confident that the Supreme Court is about to rule [shop fees] illegal on a national scale—but that will just be the beginning."); Press Release, Freedom Foundation, *Freedom Foundation files amicus briefs in landmark right-to-work case* (Dec. 6, 2017), https://www.-

The neutral principles of adjudication discussed above should be followed in every case. But they have special urgency in cases like this where the litigation is widely acknowledged to be the culmination of an avowedly political effort.[10]

Regrettably, dicta in this Court's 5-4 decisions in *Knox v. Service Employees International Union*, 567

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freedomfoundation.com/press-release/freedom-foundation-files-amicus-briefs-landmark-right-work-case/ ("The second Freedom Foundation amicus brief assumes the *Janus* ruling will invalidate *Abood* and urges the justices to include wording in it that would make enforcement easier."); Trey Kovacs, Competitive Enterprise Institute, *How Government Unions Plan to Keep Members and Dues Flowing After Janus* (Oct. 27, 2017), https://cei.org/blog/how-government-unions-plan-keep-members-and-dues-flowing-after-janus ("Government unions are preparing for a world where they can no longer force non-members to pay dues in the public sector."); The Buckeye Institute, *Supreme Court Takes Up Janus v. AFSCME* (Sept. 28, 2017), https://www.buckeyeinstitute.org/research/detail/supreme-court-takes-up-janus-v-afscme-buckeye-institute-amicus-brief-called-protection-first-amendment ("We are confident that Mr. Janus will prevail.").

[10] *See* Mahoney, *supra* note 7; Chris Opfer, *Right-to-Work Groups Eye Finish Line, 40 Years Later*, Bloomberg Law (Oct. 5, 2017), https://www.bna.com/righttowork-groups-eye-n73014470558/; Ed Rogers, *Gorsuch could deal government unions a mortal blow*, Wash. Post (Oct. 6, 2017), https://www.washingtonpost.com/blogs/post-partisan/wp/2017/10/06/gorsuch-could-deal-government-unions-a-mortal-blow/ ("[N]ow, I am hopeful that Trump appointee Justice Neil Gorsuch will come to the rescue and stand over the public-sector unions' casket with a mallet and a wooden stake.").

U.S. 298 (2012), and *Harris*, 134 S. Ct. 2618, have been widely viewed as an open invitation to mount a renewed assault on *Abood*. And partisan interests have seized upon that perceived invitation with gusto.

The plaintiffs in *Friedrichs* did little to hide that their lawsuit was nothing more than a vehicle to have this Court overrule *Abood*, and no ordinary "Case or Controversy" under Article III of the Constitution. Indeed, at each stage of the proceedings, the *Friedrichs* plaintiffs affirmatively asked the courts to rule *against* them in order to fast-track the case to the doorstep of 1 First Street, without the trouble of even developing a factual record.[11] This unseemly "rush to lose" in the courts

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[11] *See* Plaintiffs' Notice of Motion, Motion for Judgment on the Pleadings, and Memorandum of Points & Authorities in Support of Motion for Judgment on the Pleadings, *Friedrichs v. California Teachers Ass'n*, No. 8:13-cv-676-JLS-CW (C.D. Cal. July 9, 2013), ECF No. 81; Brief of Appellants, *Friedrichs v. California Teachers Ass'n*, No. 13-57095 (9th Cir. July 1, 2014), ECF No. 18-1, at 3:

> It is . . . Appellants' intention to pursue their claims before the Supreme Court. Because *this* Court's authority to grant that relief is foreclosed by binding precedent, Appellants respectfully request that the Court affirm the district court's entry of judgment on the pleadings in favor of Appellees (public-teachers unions and public-school superintendents) as quickly as practicable and without argument, so that Appellants can expeditiously take their claims to the Supreme Court.

below and serve up to this Court an abstract legal question unmoored from a factual record signaled both a departure from the ordinary course of litigation—in essence, a request for an advisory opinion—and a presumptuous confidence that the Court would be open to changing the law for mere political reasons.

So it is with a strong sense of déjà vu that the present case reaches this Court. In this latest chapter of the campaign to undo *Abood*, a state governor—who had just begun negotiating a new collective bargaining agreement with the respondent union—initially served as the standard-bearer. *See* pp. 9-10, *supra*. But when it became apparent that the governor had no Article III standing, as discussed above, the backers of this litigation effort were able to find three non-union employees (one of whom subsequently dropped out) willing to carry the baton forward by filing intervenor complaints in a case over which the district court lacked jurisdiction. *See* JA103-104.

Against this backdrop, it is no surprise that even commentators sympathetic to petitioner's cause see this case through a starkly political lens.[12]

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[12] *See, e.g.*, Ilya Shapiro & Frank Garrison, *Supreme Court Takes on Public-Sector Unions*, National Review (Oct. 10, 2017), *available at* http://www.nationalreview.com/article/452460/public-sector-unions-vs-first-amendment-supreme-court-weighs-two-new-cases ("At the start of this 'momentous'

B. The Court Should Be Vigilant in Preserving Its Apolitical Integrity.

This Term, during oral argument of *Gill v. Whitford*, the voter-redistricting case cited above, Chief Justice Roberts expressed concern about the effect on the Court's "status and integrity" if it were to continually adjudicate political disputes. As the Chief Justice put it,

> if you're the intelligent man on the street and the Court issues a decision, and let's say, okay, the Democrats win, and that person will say: 'Well, why did the Democrats win?' . . . It must be because the Supreme Court preferred the Democrats over the Republicans. . . . And that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.

Supreme Court term . . . most people are focused on partisan gerrymandering. . . . Instead, as far as politics are concerned, what the term may become known for is blunting the power and influence of public-sector unions.") (comparing this case with *Gill v. Whitford*, No. 16-1161); *see also* Fox News, *Supreme Court with Gorsuch on bench, to hear big new challenge to labor unions*, FoxNews.com (Sept. 28, 2017), http://www.foxnews.com/politics/2017/09/28/supreme-court-to-hear-new-challenge-to-labor-unions.html ("The Supreme Court is taking a fresh look at the politically explosive issue of whether unions can force workers to pay dues–this time, with a conservative majority in place.").

Gill v. Whitford, No. 16-1161, Oral Arg. Tr. at 37:18-38:11 (Oct. 3, 2017), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_mjn0.pdf.[13]

If that concern applies in any case, it applies here, where the Court is being asked by avowedly partisan groups to wipe away a 40-year-old precedent, which has been repeatedly reaffirmed, as part of a long-term political campaign. This background heightens the need for vigilance by the Court to zealously protect its apolitical role. Otherwise, the "intelligent man" will reach only one conclusion: that the Court is being asked to reach a political decision because the interests involved in that campaign think—and have telegraphed and telegraphed and telegraphed—that, based on this Court's changed membership, a 5-4 victory awaits them. Accepting that invitation on these terms risks causing that "very serious harm to the status and integrity of the decisions of this Court in the eyes of the country." *Id.*

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[13] This concern did not go unnoticed by commentators who closely follow the Court. *See, e.g.*, Opinion, Linda Greenhouse, *Will Politics Tarnish the Supreme Court's Legitimacy?*, N.Y. Times (Oct. 26, 2017), *available at* https://www.nytimes.com/2017/10/26/opinion/politics-supreme-court-legitimacy.html; Lawrence Friedman, *John Roberts has tough job of keeping faith in Supreme Court*, The Hill (Oct. 26, 2017), *available at* http://thehill.com/opinion/judiciary/357392-john-roberts-has-task-of-keeping-americas-faith-in-supreme-court.

The concern is real. A great many Americans believe that the Court is already politicized.[14] The public sees enormous dark-money[15] expenditures in nomination battles. *See, e.g.*, Margaret Sessa-Hawkins and Andrew Perez, *Dark Money Group Received Massive Donation In Fight Against Supreme Court Nominee*, Maplight (Oct. 17, 2017), *available at* https://maplight.org/story/dark-money-group-received-massive-donation-in-fight-against-obamas-supreme-court-nominee/ (detailing dark-money contributions to the Judicial Crisis Network, including one $17.9 million donation from an

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[14] *See, e.g.*, Brandon L. Bartels & Christopher D. Johnston, *Political Justice?: Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 Pub. Op. Quarterly 105, 110, 112 (2012) (In a survey of 1,500 Americans, "[r]oughly 70 percent of the mass public either agrees or strongly agrees that the Supreme Court is 'too mixed up in politics' and 'favors some groups more than others,'" and "about 64 percent of the public believes the Court is 'sometimes politically motivated in its rulings.' . . . [A] significant share of the American public perceives of the Court in politicized terms."); James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto*, 10 Ann. Rev. L. & Soc. Sci. 201, 210–11 (2014) ("[P]ublic beliefs that justices decide cases on the basis of ideology, rather than law, raise a potential threat to the legitimacy of the institution. . . . [L]egitimacy seems to flow from the view that discretion is being exercised in a principled, rather than strategic, way.").

[15] By "dark money," we mean money contributed by nonprofit organizations and used for political purposes without disclosure of the donor's identity.

undisclosed donor).[16] Even more ominously, surveys reflect a damaging public perception that the Court is predisposed in favor of large business interests at the expense of individuals and less powerful interests. *See, e.g.*, The Mellman Group, Inc., *Winning Messages: On Judges, Guns and Owning the Constitution's Text, History & Values* (Poll for the Constitutional Accountability Center) 9 (December 2017), *available at* https://www.theusconstitution.org/sites/default/files/-Mellman-CAC-Constitution-Poll-September-2017.pdf (finding that seven times as many respondents (49%) believe that this Court treats corporations more favorably than individuals as believe the Court treats individuals more favorably than corporations). "This nation's political history demonstrates the disastrous effects of the perceived politicization of the courts. . . . Where the judiciary is drawn into the political intrigues of its coordinate branches, the public might well 'fear that

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[16] *See also* Jon C. Rogowski & Andrew R. Stone, *How Politicized Judicial Nominations Affect Attitudes Toward the Courts* 31 (June 29, 2017), https://scholar.harvard.edu/files/rogowski/files/politicized-nominations.pdf ("The political drama that accompanied the failed nomination of Robert Bork, the hotly-debated nomination of Clarence Thomas, and the Senate's refusal to consider Merrick Garland's nomination has generated concern from all sides of the political spectrum about the deleterious consequences of politicization."); James L. Gibson & Gregory A. Caldeira, *Confirmation Politics and The Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination*, 53 Am. J. Pol. Sci. 139 (Jan. 2009) (finding that the perception of impartiality "is a key source of judicial legitimacy").

the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshaled on opposite sides will be too apt to stifle the voice both of law and of equity.'" *Wolfson v. Concannon*, 750 F.3d 1145, 1164–65 (9th Cir. 2014) (Berzon, J., concurring) (quoting *The Federalist No. 81*, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). It is not difficult to see the "pestilential breath of faction" here.[17] Indeed, this case is filled

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[17] Political history can be viewed through the lens of a long struggle between the powerful "influencer class" that controls the levers of government in order to enrich itself, and a far larger group of ordinary individuals that simply wants government to defend both itself and them from that influencer class. *See, e.g.*, Niccoló Machiavelli, *The Prince*, ch. IX (1513) (speaking of "two distinct parties" in a governed society: one, "the nobles [who] wish to rule and oppress the people," and two, "the people [who] do not wish to be ruled nor oppressed by the nobles"); Andrew Jackson, Veto Message Regarding the Bank of the United States (July 10, 1832), *available at* http://avalon.law.yale.edu/19th_century/ajveto01.asp (distinguishing between "the rich and powerful [who] too often bend the acts of government to their selfish purposes" and the "humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves"). It is not difficult to see on which side the persistent claque of well-funded *amici* falls. And concerns about the perceived power of the influencer class are well founded, with recent studies illustrating the high rewards (a return of nearly 1000-1 for lobbying expenditures) and high stakes (over $700 billion per year for one subsidy) for America's "influencer" class. *See* Bill Allison & Sarah Harkins, Sunlight Found., *Fixed Fortunes: Biggest Corporate Political Interests Spend Billions, Get Trillions* (Nov. 17, 2014), https://sunlightfoundation.com/2014/11/17/fixed-fortunes-

with perilous markers: a blatant political goal; persistent and sustained engagement by the special interests pursuing that goal, backed by repeat-player *amici*; a perceived invitation by the Court to seek the overruling of a deeply entrenched and repeatedly reaffirmed precedent; the absence of anything resembling a traditional Article III "Case or Controversy"; the plaintiffs' anomalous rush to lose in a previous chapter of this litigation effort; untoward expressions of confidence by those driving the effort that this case will be decided by a 5-4 majority; and the suitors seeking that the Court cast aside of norms of justiciability and *stare decisis*. The Court can have no confidence that the partisan goals of special-interest litigation funders will self-regulate; it will need to defend itself and the Judiciary as a whole. This case presents the opportunity for that correction.

CONCLUSION

This Court should dismiss the writ of certiorari as improvidently granted or, in the alternative, affirm the judgment of the court of appeals for the Seventh Circuit.

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biggest-corporate-political-interests-spend-billions-get-trillions/; Laurence Cockroft & Anne-Christine Wegener, *Unmasked* 14 (2017) (showing a 750-1 ratio); *see also* http://priceofoil.org/fossilfuel-subsidies/.

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